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Nos. 03-1116 & 03-1120

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, *et al.*

Petitioners,

v.

ELEANOR HEALD, *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF AMERICAN HOMEOWNERS ALLIANCE; AMERICAN LEGISLATIVE EXCHANGE COUNCIL; AMERICANS FOR TECHNOLOGY LEADERSHIP; COMPETITIVE ENTERPRISE INSTITUTE; CONSUMER ALERT; eBAY, INC.; INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; INTERNET COMMERCE COALITION; NETCHOICE; PACIFIC RESEARCH INSTITUTE; THE PROGRESS & FREEDOM FOUNDATION; SOFTWARE & INFORMATION INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. INTERSTATE E-COMMERCE IS AN IMPORTANT PART OF THE NATIONAL COMMON MARKET THAT THE DORMANT COMMERCE CLAUSE IS DESIGNED TO PROTECT	5
A. E-Commerce Delivers Substantial Benefits to Consumers and Small Businesses	7
B. Discriminatory State Barriers Are Restraining the Growth of E-Commerce.	9
II. MICHIGAN'S DISCRIMINATORY LICENSING SCHEME VIOLATES THE DORMANT COMMMERCE CLAUSE	13
A. Statutes That Discriminate Against Interstate Commerce Are Virtually Always Invalid Under The Dormant Commerce Clause	14
B. Michigan Has Failed To Demonstrate that It Has No Nondiscriminatory Means of Advancing Its Legitimate State Interests	17
1. Michigan Has Available Nondiscriminatory Means of Collecting Taxes on Wine	18

2. Michigan Has Available Nondiscriminatory Means of Preventing Minors from Buying Wine..... 19

III. THE TWENTY-FIRST AMENDMENT DOES NOT SAVE MICHIGAN'S DISCRIMINATORY STATUTORY SCHEME FROM A FINDING OF UNCONSTITUTIONALITY UNDER THE DORMANT COMMERCE CLAUSE..... 20

A. The Purpose of the Twenty-first Amendment Was to Permit the States to Be Dry, Soaking Wet, or Somewhat Damp, Not To Permit States To Favor Local Interests By Discriminating Against Out-Of-State Producers..... 22

***B.* The Advent of the Internet Does Not Justify State Discrimination Against Interstate Commerce..... 24**

CONCLUSION..... 25

TABLE OF AUTHORITIES

Federal Cases

Am. Library Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) 9

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 13, 22, 23, 24

Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002) 16

Beskind v. Easley, 325 F.3d 506, (4th Cir. 2003) 16

Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000) 14

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 14

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 15, 18

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 22, 23

Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997) 12

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 24

Craig v. Boren, 429 U.S. 190 (1976) 22

Craigsmiles v. Giles, 312 F. 3d 220 (6th Cir. 2002) 11

Cyberspace Communs., Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999) 9

Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 22

Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 504 U.S. 353 (1992) 12

Gibbons v. Ogden, 22 U.S. 1 (1824) 13

Halliburton Oil Well Cementing Co. v. Reilly, 373 U.S. 64 (1963) 17

Heald v. Engler, 342 F.3d 517, (6th Cir. 2003), *cert. granted sub. nom. Heald v. Engler*, 124 S. Ct. 2389 (2004) 13, 15, 16

Healy v. Beer Inst., 491 U.S. 324 (1989) 13, 21

Hughes v. Oklahoma, 441 U.S. 322 (1979) 13, 16, 18

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) 6, 7

Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore., 511 U.S. 93 (1994) 15

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 14, 15, 18

State Bd. of Equalization of Cal. v. Young's Market, 299 U.S. 59 (1936) 22

Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (2004) 14, 17

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 22

Federal Statutes

15 U.S.C. §§ 7601 *et seq.* (2004) 12

27 U.S.C. § 122a (2004) 19

State Statutes & Administrative Materials

Mich. Admin. Code r. 436 1527 (2004) 22

Mich. Comp. Laws § 436.1203 (2004) 16, 20

Constitutional Provisions

U.S. Const. Amend. XXI ..... passim

U.S. Const. art. I § 8 cl. 3 ..... passim

U.S. Const. art. IV § 2 cl. 1 13

Legislative Materials

State Impediments to E-commerce: Consumer Protection or Veiled Protectionism: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce, 107th Cong. 2d Sess. (2002) 8, 11, 12

H.R. Rep. No. 106-265 19

Miscellaneous

Chateau Chantal, *at* http://www.chateauchantal.com 17

Chateau Grand Traverse, *at* http://www.cgtwines.com 17

Contessa Wine Cellars, *at* http://www.contessawinecellars.com 17

Fed. Trade Comm'n, *Public Workshop: Possible Anticompetitive Effects to Restrict Competition on the Internet*, Transcript (Oct. 9, 2002), *at* http://www.ftc.gov/opp/e-commerce/anticompetitive/021009antitrans.pdf 11

Federalist No.7 15

Laurence H. Tribe, American Constitutional Law 1167 (3rd ed. 2000) 23, 24

Letter from Todd J. Zywicki, Director, Office of Policy Planning, Federal Trade Commission, to William Magee, Chairman, Assembly Agriculture Committee of the State of New York (March 29, 2004), *at* http://www.ftc.gov/be/v040012.pdf 17

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State Impediments to E-commerce: Consumer Protection or Veiled Protectionism: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce, 107th Cong. 2d Sess. (2002) ..... passim

U.S. Census Bureau, *Retail E-Commerce Sales in Second Quarter 2004 Were $15.7 Billion, Up 23.1 Percent From Second Quarter 2003, Census Bureau Reports,* United States Department of Commerce News (Aug. 20, 2004), *at* http://www.census.gov/mrts/www/current.html 7

INTEREST OF THE *AMICI*[*]

Amici are entities involved directly or through their members in electronic commerce. We submit this brief to highlight the significance of these cases for e-commerce, not only relating to wine, but also in other goods and services.

The **American Homeowners Alliance** represents the nation's 70 million homeowners in their desire to use the Internet to its full potential to efficiently and economically obtain the goods and services they need and desire.

The **American Legislative Exchange Council** (ALEC) is the nation's largest bipartisan association of state legislators. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve individual liberty. ALEC's interest in this case stems from its concern that laws unnecessarily restricting competition by forcing consumers to utilize an antiquated monopoly system have established false barriers that discriminate against e-commerce and free market forces.

Americans for Technology Leadership (ATL) is a broad-based coalition of technology professionals, consumers and organizations dedicated to limiting government regulation of technology and fostering competitive market solutions to public policy issues affecting the technology industry. ATL's interest in this proceeding stems from its work to allow the growth of technology, including e-commerce, without burdensome government regulation.

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[*] Consent to the filing of *amicus* briefs has been lodged with the Clerk of this Court. No counsel to a party has authored any portion of this brief. No party or entity other than those listed as amici on the cover of this brief has contributed monetarily to the preparation or submission of this brief.

The **Competitive Enterprise Institute** is a nonpartisan policy analysis organization, dedicated to the principles of limited constitutional government and free enterprise. The Competitive Enterprise Institute has a substantial interest in supporting the position that the Commerce Clause protects the national market from protectionist state legislation and has a specific interest in alcohol-related issues.

Consumer Alert is a national non-partisan, non-profit consumer organization dedicated to enhancing understanding and appreciation of the free market. Consumer Alert accordingly provides economic, scientific, and risk data affecting public policy decisions to legislative and regulatory bodies, courts, the media and the public. Consumer Alert has an interest in this case because its members are harmed by the limitations on free trade imposed by state bans on direct shipment of out-of-state wine.

eBay Inc. with over 100 million registered users, is the world's largest online marketplace and the most popular shopping site on the Internet. Using eBay's online services, buyers can search for and buy goods and services in thousands of categories.

The **Internet Commerce Coalition** (ICC) is a coalition of Internet service providers, e-commerce companies, and trade associations in the United States. ICC's members include AT&T, BellSouth Corporation, Comcast Corporation, eBay Inc., MCI, Inc., SBC Communications Inc., Time Warner, and Verizon Communications.

The **Information Technology Association of America** (ITAA) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the information technology industry. ITAA 's members range from the smallest information technology

start-ups to industry leaders in the Internet, software, information services, digital content, systems integration, telecommunications, and enterprise solution fields

NetChoice is a coalition of businesses and consumers who are united in promoting the increased choice and convenience enabled by e-commerce. NetChoice members have a direct interest in preventing and removing barriers to e-commerce, such as protectionist laws that prevent interstate shipments of wine.

The **Pacific Research Institute** is a non-partisan, non-profit think tank based in San Francisco that focuses on finding market-based solutions to important public policy problems. One of PRI's key areas of research is electronic commerce. PRI's members are consumers who are harmed by the limitations on free trade imposed by the ban on direct shipment of out-of-state wine by the states of New York and Michigan.

The **Progress & Freedom Foundation** is a non-profit research and educational institution that studies the digital revolution and its implications for public policy, based on a philosophy of limited government, free markets and individual sovereignty. PFF's underlying philosophy combines an appreciation for the positive impacts of technology with a classically conservative view of the proper role of government. PFF's interest in this proceeding stems from its commitment to promoting expanded use of the Internet for e-commerce, free of discriminatory state regulation.

The **Software & Information Industry Association** (SIIA) is the leading U.S. trade association committed to promoting and protecting the interests of the software and information industries. SIIA represents over 600 member companies,

including prominent publishers of software and information products for reference, education, business, consumer, Internet and entertainment uses.

SUMMARY OF ARGUMENT

As interstate commerce has grown, businesses have used a variety of technological means—from mail-order-catalogs to 1-800 numbers to, most recently, electronic commerce using the Internet—to reach consumers nationwide. E-commerce facilitates the realization of the Founders' vision of a national common market by permitting even the smallest merchant to reach consumers in every state and by giving consumers the broadest possible choice of products and vendors. As this Court has repeatedly recognized, that market will be destroyed if states are permitted to enact measures that discriminate against interstate commerce in favor of local economic interests.

Michigan's prohibition on direct sales by out-of-state wineries to Michigan consumers, while simultaneously permitting direct sales by Michigan wineries, is such a discriminatory measure. Under established dormant Commerce Clause doctrine, such measures are constitutional only if the state bears the burden of showing the absence of nondiscriminatory means to advance its legitimate interests. In this case, the state's asserted interests of ensuring revenue collection and preventing sales to minors do not require discrimination against interstate sales and the attendant obstruction of e-commerce.

The Twenty-first Amendment does not save Michigan's otherwise unconstitutional discrimination. The assertion that the Twenty-first Amendment trumps the Commerce Clause when the state regulates the importation

of wine is untenable and contrary to this Court's precedents. The Twenty-first Amendment is not a license to discriminate against interstate sales or to protect local merchants from interstate competition. By permitting in-state wineries to make direct sales to consumers, while prohibiting all out-of-state wineries from making such sales, Michigan has exceeded the temperance interests that the Twenty-first Amendment was designed to protect, and its discriminatory regime must fall as offensive to the Commerce Clause.

ARGUMENT

I. INTERSTATE E-COMMERCE IS AN IMPORTANT PART OF THE NATIONAL COMMON MARKET THAT THE DORMANT COMMERCE CLAUSE IS DESIGNED TO PROTECT

This is a case about discriminatory state regulation of the sale of wine. More fundamentally, it is a case about the viability of interstate electronic commerce ("e-commerce") in the United States. Petitioners consider the interstate buying and selling of products and services via the Internet as a threatened "major breach of state regulatory regimes," Wholesalers' Br. at 38, and ask the Court to approve Michigan's blatantly discriminatory legislation in response to that threat. But interstate e-commerce, whatever the challenges it may pose to entrenched commercial interests and state regulatory bureaucracies, is also the most dramatic modern manifestation of the national common market that the Framers of the Constitution sought to promote. The protection of that market is the paramount goal of the Commerce Clause. *Amici,* organizations committed to the growth of e-commerce, urge the Court to take this opportunity to clearly delineate the crucial role of the

dormant Commerce Clause in preventing local protectionism from undermining that national market and the benefits it brings to consumers and businesses throughout America.

When the Framers wrote the Commerce Clause, they recognized the profound importance that a national market would have for the nation as a whole, as well as for the individual states. *See The Federalist* No. 42 (James Madison); Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces18.html. Although the Framers could not have imagined the technological advances that have led to the Internet, they could imagine, and worked to establish, the open, nondiscriminatory, and national market that the Internet and e-commerce have come to epitomize. As this Court recognized in *H.P. Hood & Sons, Inc. v. DuMond*, access to a national market is a strong incentive for economically productive activities, and a powerful check on state protectionism:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. . . . Likewise, every consumer may look to the free competition of every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

336 U.S. 525, 539 (1949). As the national market has grown, small businesses have participated in it by using a variety of tools—mail order catalogues, 1-800 numbers, and, most recently, the Internet. The Internet is the quintessential interstate commerce medium that overcomes the tyranny of

distance, letting sellers in every state reach customers in every other state, thus fulfilling the Founders' vision of a single national market.

A. E-Commerce Delivers Substantial Benefits to Consumers and Small Businesses

E-commerce delivers tangible benefits to all participants in the U.S. economy, but especially to consumers and small businesses. The United States Department of Commerce Census Bureau tracks e-commerce retail sales, which provide a compelling picture of the rapidly increasing role of e-commerce in the national economy. Retail e-commerce sales in the second quarter of 2004 amounted to $15.7 billion, up 23.1% from the second quarter of 2003, and representing 1.7% of the $919 billion in total U.S. retail sales during that period. *See* U.S. Census Bureau, *Retail E-Commerce Sales in Second Quarter 2004 Were $15.7 Billion, Up 23.1 Percent From Second Quarter 2003, Census Bureau Reports,* United States Department of Commerce News (Aug. 20, 2004), *available at* http://www.census.gov/mrts/www/current.html. Since the fourth quarter of 1999, when the Census Bureau began publishing this data, e-commerce retail sales have increased 193%. *See id.*[1] Online retail sales are growing at ten times the rate of their "brick-and-mortar" counterparts. *See State Impediments to E-commerce: Consumer Protection or Veiled Protectionism: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce,* 107th Cong. 2d Sess. 7 (2002)

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[1] Some knowledgeable observers estimate even greater numbers. For example, *amicus* Progress & Freedom Foundation estimates that business to consumer electronic commerce is expected to grow from $95.7 billion in 2003 to $229 billion in 2008. The Progress & Freedom Foundation, *Digital Economy Fact Book* 63 (6th Ed. 2004).

[hereinafter *Commerce Committee Hearing*]. As of 2002, e-commerce between businesses had reached roughly $1 trillion per year, *see Commerce Committee Hearing*, at 1 (statement of Rep. Cliff Stearns, Chairman, House Subcomm. on Commerce, Trade, and Consumer Protection). Such growth is staggering, and directly attributable to the protections offered by the dormant Commerce Clause and its assurance of a national marketplace.

E-commerce is available for virtually *all* products and services, from BMWs to bulldozers, antique furniture to hi-tech computers; from the oldest vinyl records to the most recent DVDs, and for a widening array of services, from graphic design to auto repair. *See, e.g., Commerce Committee Hearing*, at 15; Fed. Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* 2 n.3 (2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf [hereinafter *FTC Study*]. Perhaps the quintessential business illustrating this is that of *amicus* eBay, an online marketplace bringing together over 100 million registered buyers and sellers, and currently containing more than 20 million listings, including those products and services mentioned above, in over 45,000 discrete categories.

The benefits of e-commerce to consumers are the benefits of market competition: greater choice and lower prices. Consumers now have the ability to do nationwide comparison shopping for nearly everything they buy, and e-commerce has lowered the costs of doing business across state lines. Online sellers must compete not only with other online sellers, but also with those working in traditional retail channels. Likewise, traditional "brick-and-mortar" businesses can no longer base their prices on what the local market permits but must consider the price for similar goods on Internet sites. E-commerce has proved essential to many small businesses, who have gained access to larger markets

without having to pay fees to middlemen or setting additional distribution channels.

As a result, consumers have the opportunity to choose the most attractive product from a variety of online and traditional sellers. This vigorous national competition has driven prices down, benefiting both consumers and the economy. That same competition, however, has begun to displace entrenched local commercial interests who view the Internet as a threat. As in the case of wine sales, these interests often seek discriminatory state regulation in order to stifle the growth of e-commerce.

B. Discriminatory State Barriers Are Restraining the Growth of E-Commerce

The benefits of e-commerce to the national economy cannot be fully realized if states may enact regulations that discriminate against interstate transactions.[2] The laws at issue in this case, and in *Swedenburg v. Kelly*, No. 03-1274 (2004), are just such enactments: they make difficult or

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[2] A number of lower courts have recognized that the inherently interstate nature of the Internet renders e-commerce especially vulnerable to varying state regulations, and courts have properly given that factor special importance when undertaking dormant commerce clause analysis. *See e.g., Center for Democracy & Tech. v. Pappert*, No. 03-5051, 2004 U.S. Dist. LEXIS 18295 (E.D. Pa. Sept. 10, 2004); *Cyberspace Communs., Inc. v. Engler*, 55 F. Supp. 2d 737, 751-52 (E.D. Mich. 1999); *Am. Library Ass'n v. Pataki*, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997) ("The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed. Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet.").

impossible the very type of interstate commercial activity most significantly enhanced through e-commerce.

The specific barriers in question here and their counterparts in other states have dramatically stunted the sale and purchase of wine over the Internet. In its recent report on state barriers to e-commerce in the wine industry, the Federal Trade Commission (FTC) notes that "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." *FTC Study*, at 3.

Although the regulations challenged in this case arise in the context of the sale of wine, they are similar to barriers erected by states with regard to other products, where dubious consumer-protection rationales have been used to block online competition from out-of-state sellers. In its recent decision dealing with state barriers to casket sales, the 10th Circuit concluded, "While baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments." *Powers v. Harris*, 2004 U.S. App. LEXIS 17926, at *35 (10th Cir. Aug. 23, 2004).

For example, at the urging of state-licensed ophthalmologists, a number of states have sought to discourage the online sale of disposable contact lenses through a variety of discriminatory mechanisms. These include prohibiting customers from getting access to their prescriptions, restricting contact lens sales to only face-to-face transactions, and artificially shortening the length of a contact lens' prescription life-span in order to force consumers to have their eyes checked more frequently, and to purchase new contact lenses from their local eye-care providers. *See, e.g.*, Fed. Trade Comm'n, *Public Workshop:*

Possible Anticompetitive Effects to Restrict Competition on the Internet, Tr. at 321, *et seq.* (Oct. 9, 2002), *available at* http://www.ftc.gov/opp/e-commerce/anticompetitive/021009antitrans.pdf [hereinafter *FTC Workshop*]. *See also Commerce Committee Hearing*, at 26-27.

As another example, some states have placed onerous restrictions on the sale of caskets, such as requiring residents to purchase caskets only from state-licensed funeral directors. *See, e.g., FTC Workshop*, at 459 *et seq.* This can be a substantial burden for online sellers, who must spend significant time and money to become licensed funeral directors in order to comply with state regulation. *See Craigsmiles v. Giles*, 312 F. 3d 220 (6th Cir. 2002) (finding that Tennessee's prohibition against the retail sale of caskets by anyone but licensed funeral directors was not rationally related to a legitimate state interest). *But see Powers*, 2004 U.S. App. LEXIS 17926, at *6, *10 (upholding, against challenges unrelated to the Commerce Clause, Oklahoma's prohibition against intrastate online casket sales by anyone but licensed funeral directors).

Although these situations involve different products,[3] they share a common trait: as in the cases currently before the Court, parochial business interests have used protectionist state legislation in an attempt to insulate themselves from the interstate competition that e-commerce permits. *See, e.g., Giles*, 312 F.3d at 225 (describing restrictions on casket sales as "nothing more than an attempt

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[3] Besides caskets and contact lenses, protectionist state barriers against e-commerce have been identified with respect to a number of other products, including automobiles, and for some services, such as real estate, mortgages, and financial services. *See Commerce Committee Hearing*, at 2 (statement of Rep. Cliff Stearns). *See also FTC Study*, at 2 n.3.

to prevent economic competition," and describing the state's justifications as frivolous); *Commerce Committee Hearing*, at 22-23 (describing resistance to online sales of contact lenses by eye doctors, even though many alternative ways to address health and safety concerns existed).

While Congress certainly could, and sometimes does, exercise its affirmative Commerce Clause powers to prevent this kind of discriminatory state regulation,[4] it cannot possibly keep track of or act to repel the constant pressure for anti-competitive state legislation. The dormant Commerce Clause operates as the structural bulwark and guardian of the national market-place against the natural tendencies of local interests to capture the machinery of state government to advantage themselves and burden their distant, widely-dispersed competitors. This Court has made clear that, even where Congress has not chosen to act, the Commerce Clause operates to prevent the kind of economic Balkanization that would result from unchecked state discrimination against interstate commerce. *See, e.g., Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 595 (1997) ("The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination ... would invite significant inroads on our "national solidarity") (internal citation omitted); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992) ("As we have long recognized, the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advancing their own commercial interests by curtailing the movement of articles of commerce,

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[4] Congress has exercised its Commerce Clause authority with respect to contact lenses by passing the Fairness to Contact Lens Consumer Act, 15 U.S.C. §§ 7601-7610 (2004), which prohibits anti-competitive activities surrounding contact lens sales.

either into or out of the state.'") (internal citation omitted); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

Nor is the rationale of the dormant Commerce Clause purely economic. By refusing to countenance local protectionism, the Commerce Clause reins in the natural tendency to parochialism in local policymaking, and provides incentives for legislators to consider broader public concerns. Thus, like the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1, the Commerce Clause reinforces the structural integrity of the Union created by the Constitution, another reason why its goals have long been considered the "object riding over every other in the adoption of the constitution." *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824) (Johnson, J., concurring).

II. MICHIGAN'S DISCRIMINATORY LICENSING SCHEME VIOLATES THE DORMANT COMMMERCE CLAUSE.

The Sixth Circuit employed the correct analytical approach in striking down Michigan's discriminatory prohibition of interstate wine sales. It used the two-step process previously employed by this Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274 (1984): first, determining whether the state's discriminatory regulation would violate the dormant Commerce Clause if alcoholic beverages were not involved; and second, if it would, whether the Twenty-first Amendment saves the otherwise unconstitutional law. *Heald v. Engler*, 342 F.3d 517, 524 (6th Cir. 2003), *cert. granted sub nom. Granholm v. Heald*, 124 S. Ct. 2389 (2004). *See also, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 342-43 (1989) (refusing to uphold price affirmation on Twenty-first Amendment grounds after engaging in Commerce Clause analysis); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S.

573, 584 (1986) (applying two-step analysis and rejecting argument that Twenty-first Amendment immunizes state statutes from Commerce Clause scrutiny).

Here, the answer to the first inquiry is straightforward: Michigan's discriminatory scheme would certainly violate the dormant Commerce Clause if applied to commerce in any product other than alcoholic beverages. Even those courts that have upheld discrimination like that involved in this case have readily conceded its invalidity in the absence of the Twenty-first Amendment. *See Swedenburg v. Kelly*, 358 F.3d 223, 238 (2d Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (2004) ("We fully recognize that the physical presence requirement [of New York's alcohol regulation] could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol."); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000) ("If the product were cheese rather than wine, Indiana would not be able. . . to close its borders").

A. Statutes That Discriminate Against Interstate Commerce Are Virtually Always Invalid Under The Dormant Commerce Clause.

Michigan's discrimination against out-of-state sellers offends deeply rooted Commerce Clause principles. The incorporation of the Clause into the Constitution reflected the Founders' acknowledgement that states could become captive to local interests to the detriment of the nation as a whole. *See The Federalist* No. 7 (Alexander Hamilton). In recognition of this core principle, the Court has held that statutes that discriminate against interstate commerce in purpose or effect are virtually *per se* invalid. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). "The

central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (citing *The Federalist* No. 22, at 143-145 (Alexander Hamilton) (Clinton Rossiter ed., 1961) and James Madison, *Vices of the Political System of the United States*, *in Writings of James Madison* 362-363 (Gaillard Hunt ed., 1901)). "The evil of protectionism can reside in legislative means as well as legislative ends." *New Jersey*, 437 U.S. at 626.

If a state statute treats in-state and out-of-state actors differently in a way that favors the in-state interests and disfavors out-of-state interests, that regulation is discriminatory for dormant Commerce Clause purposes. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994). Here, Michigan's statutory scheme permits in-state wineries to sell their products directly to consumers over the Internet, as some of them do. *See Heald v. Engler*, 342 F.3d at 521[5] In contrast, out-of-state wineries may not sell directly to consumers, over the Internet or otherwise, but may sell to Michigan consumers only through Michigan wholesalers and retailers.[6] *See, e.g.*, Mich. Comp.

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[5] *See also, e.g.*, Chateau Grand Traverse, *at* http://www.cgtwines.com (Michigan winery advertising over the Internet and accepting phone, fax, and mail orders), (last visited Sept. 21, 2004); Chateau Chantal, *at* http://www.chateauchantal.com (Michigan winery shipping directly to consumers but requiring an adult signature on delivery) (last visited Sept. 21, 2004); Contessa Wine Cellars, *at* http://www.contessawinecellars.com (shipping within Michigan and accepting online orders) (last visited Sept. 21, 2004).

[6] Like many states, Michigan has set up a three-level system of alcohol distribution, similar to that established by many states after the repeal of prohibition. Suppliers may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers; and only licensed retailers

Laws § 436.1203 (2004) (prohibiting out of state wine sellers from selling directly to consumers); *Heald*, 342 F.3d at 521 (explaining the Michigan restrictions and quoting the Michigan Liquor Control Commission for the statement that "there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents."). This differential treatment ensures that out-of-state wineries have severely reduced access to Michigan customers and that those wineries must share revenues with middlemen, thus reducing profits and increasing prices to consumers, as compared with the price of Michigan wines. *See Bainbridge*, 311 F. 3d at 1106-07; *cf. Beskind v. Easley*, 325 F.3d 506, 520 (4th Cir. 2003) (noting that direct shipping ban increases access only to wine produced in-state).

Like the other courts of appeals that have held similar out-of-state shipping bans unconstitutional,[7] the Sixth Circuit correctly found that Michigan's statutory scheme is discriminatory. *Heald*, 342 F.3d at 527-28. The presence of that discrimination requires the state to demonstrate the absence of nondiscriminatory means to advance the state's legitimate purposes. *See, e.g., id.; Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). That is a showing that Michigan has failed to make.

– and, tellingly, Michigan-based wineries – may sell to consumers. All retailers, including Michigan direct shippers, must have a presence in the state. Thus the Michigan system is also biased towards offline "brick-and-mortar" transactions, and against those carried out online.

[7] *See, e.g., Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) (finding North Carolina's restriction on out-of-state direct shipping to be discriminatory); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) (striking down discriminatory Florida law that prohibited the use of common carriers to deliver wine, but permitted in-state wineries to have their own delivery fleets).

Even if Michigan were to adjust its system, as New York has done, *see Swedenburg v. Kelly*, 358 F.3d 223, 238-39 (2d Cir. 2004), to allow direct sales by any licensed entity with a physical presence in the state, it would not change the fundamentally discriminatory character of its regime, and would not save it from invalidity under the Commerce Clause. Physical presence requirements, while facially neutral, clearly discriminate against online sellers by raising their costs. To require a vintner to establish an office in New York as a precondition to allowing Internet sales to be fulfilled by direct shipment from the vineyard in California is economically irrational, and serves only to eliminate "one of the main efficiency benefits of e-commerce, the ability to provide goods and services over large distances without the need for a substantial, far-flung physical presence." Letter from Todd J. Zywicki, Director, Office of Policy Planning, Federal Trade Commission, to William Magee, Chairman, Assembly Agriculture Committee of the State of New York 13 (March 29, 2004), *available at* http://www.ftc.gov/be/v040012.pdf. The inescapable clash between physical presence requirements and the Commerce Clause's core objective of promoting growth of national markets renders this species of protectionist discrimination, which weighs most heavily on e-commerce participants, just as objectionable as the facial discrimination practiced by Michigan. *See Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 72 (1963) (a state cannot require an out-of-state company to "become a resident in order to compete on equal terms.").

B. Michigan Has Failed To Demonstrate that It Has No Nondiscriminatory Means of Advancing Its Legitimate State Interests.

Facially discriminatory statutes such as Michigan's receive the highest level of judicial scrutiny. *See, e.g.*,

Hughes, 441 U.S. at 337 ("At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."). The Court routinely refers to such statutes as being virtually *per se* invalid. *See New Jersey*, 437 U.S. at 624, reflecting the fact that nondiscriminatory means almost always exist to accomplish legitimate state objectives. Here, petitioners offer only two substantive rationales to support its discriminatory system: revenue collection and the protection of minors. *See* Wholesalers' Br. at 7, 13; Mich. Br. at 33. The state, however, has readily available nondiscriminatory means to address each of these legitimate interests.

1. Michigan Has Available Nondiscriminatory Means of Collecting Taxes on Wine.

Alone, "revenue generation is not a local interest that can justify discrimination against interstate commerce." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). Michigan has a legitimate interest in taxing the consumption of wine in Michigan, regardless of where the wine originates, but it does not need to discriminate against interstate commerce in order to do so.

A number of nondiscriminatory means exist through which states can and do impose taxes in connection with direct sales of wine to consumers from out-of-state vendors. The recent study by the FTC found that most of the states that permit direct shipments of wine to consumers have, in fact, reported no significant problems with tax collection as a result of that practice. *See FTC Study*, at 4. Michigan could, for example, impose a non-discriminatory tax payable by all

in-state direct purchasers (whether from in-state or out-of-state wineries) along with nondiscriminatory reporting requirements on all direct sellers that would facilitate the identification of those purchasers. Michigan might follow the lead of other states that require delivery services such as FedEx to provide periodic reports of wine shipments to interstate consumers. *See FTC Study*, at 36-37. Alternatively, nondiscriminatory licensure requirements that would assist in revenue collection could be imposed on all direct sellers.[8] Congress has provided states with legal tools specifically designed to assist them in enforcing these and similar requirements even outside their borders. *See* Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a (2004) (giving states extra-territorial authority to sue out-of-state violators of distribution and importation laws in federal court).[9] Without full consideration of these alternatives, Michigan cannot meet its dormant Commerce Clause burden of showing a need for facially discrimination against interstate commerce.

2. Michigan Has Available Nondiscriminatory Means of Preventing Minors from Buying Wine.

The state's undoubtedly legitimate interest in protecting minors can also be satisfied through nondiscriminatory means. Petitioners argue that the Internet threatens states with "being flooded" in a sea of unregulated

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[8] However, as explained above, any requirement that licensees establish a physical presence in the state would overstep into the discriminatory realm that runs afoul of the core goals of the Commerce Clause.

[9] The Act's legislative history shows that it was enacted for the specific purpose of giving states additional law enforcement tools for collecting taxes on liquor sales and preventing sales to minors. *See* H.R. Rep. No. 106-265, at 5 (1999).

alcohol from out-of-state sources and attendant juvenile drinking problems. Wholesalers' Br. at 38; *see also* Mich. Br. at 33. The analysis by the FTC, however, suggests otherwise: "*The states that permit interstate direct shipping generally report few or no problems with shipments to minors.*" *FTC Study*, at 4 (emphasis added).[10] Michigan's position, moreover, is belied by the fact that Michigan permits its own wineries to sell directly to consumers over the Internet, or by phone, fax or mail, thus creating the same "problem" that it invokes to justify prohibition of out-of-state direct sales. In all events, nondiscriminatory means are readily available to the State, such as requiring an adult signature upon delivery. *See* Mich. Comp. Laws § 436.1203 (2004); Mich. Admin. Code r. 436.1527 (2004); Mich. Br. at 8. The common carriers that deliver direct wine purchases are fully subject to the jurisdiction of the state for violation of such a requirement.

III. THE TWENTY-FIRST AMENDMENT DOES NOT SAVE MICHIGAN'S DISCRIMINATORY STATUTORY SCHEME FROM A FINDING OF UNCONSTITUTIONALITY UNDER THE DORMANT COMMERCE CLAUSE.

Petitioners make no effort to justify Michigan's facially discriminatory alcoholic beverage regime as

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[10] In testimony to the Federal Trade Commission, Michigan did report instances of interstate sales of wine to minors. *Id.* at 35. Michigan gathered this data by using minors in a sting operation. It does not follow that because a minor might order an out-of-state case of wine over the Internet, he or she is likely to do so (rather than buying a six-pack of beer locally). *See, e.g., FTC Study* at 32, App B. (California regulator testimony to that state legislature's committees on the wine industry, stating that "I do believe the sale-to-minor issue is overblown," and suggesting that a minor intent on purchasing alcohol would not do it through mail orders).

indispensable to effectuate the state's legitimate interests. They argue instead that, as a consequence of the adoption of Section 2 of the Twenty-first Amendment, no justification for Michigan's discrimination against interstate commerce is constitutionally required. The state petitioners thus argue that, "a state is *totally unconfined* by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." Mich. Br. at 26 (emphasis added). Wholesaler petitioners similarly argue that under the Twenty-first Amendment, states "may impose any regulation of physical importation without offending the Commerce Clause if there is any reasonably conceivable state of facts that could provide a rational basis for the regulation." Wholesalers' Br. at 14.

This position is untenable. The state regulation of alcohol does not free the state from all meaningful constitutional restraints on its ability to favor in-state economic interests by discriminating against interstate commerce. The Twenty-first Amendment creates no such license to discriminate. Indeed, a law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy v. Beer Inst.*, 491 U.S. at 324 (Scalia, J., concurring). The Amendment's purpose was "to allow states to prohibit the importation of alcohol, at least *through laws of a suitably nondiscriminatory sort*." 1 Laurence H. Tribe, American Constitutional Law 1167 (3rd ed. 2000) (emphasis added). A state may use its authority under the Amendment to prevent out-of-state merchants from frustrating state temperance or regulatory policies by engaging in conduct that the state has lawfully forbidden to in-state merchants; it may not use that authority to prohibit interstate transactions on alcohol that it has chosen to permit within its borders.

A. The Purpose of the Twenty-first Amendment Was to Permit the States to Be Dry, Soaking Wet, or Somewhat Damp, Not To Permit States To Favor Local Interests By Discriminating Against Out-Of-State Producers.

This Court has characterized assertions that the Twenty-first Amendment gives states a blanket exemption from the dormant Commerce Clause as "patently bizarre and demonstrably incorrect." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980) (quoting *Hostetter v. Idlewild Liquor Corp*, 377 U.S. 324, 331-32 (1964)). Although early Twenty-first Amendment cases such as *State Bd. of Equalization of Cal. v. Young's Market*, 299 U.S. 59 (1936) appeared to describe a broad, virtually unqualified state power to regulate liquor, the Court has clearly withdrawn from that position. The view "that the Twenty-first Amendment has somehow operated to repeal the Commerce Clause wherever regulation of intoxicating liquors is concerned [is] an absurd oversimplification." *Hostetter*, 377 U.S. at 331-32.[11]

In resolving asserted conflicts between the Twenty-first Amendment and the Commerce Clause, courts must proceed from the premise that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete

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[11] Indeed, the Court has found that a number of constitutional provisions limit state power under the Twenty-first Amendment. *See, e.g., Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (due process clause); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 344 (1964) (export-import clause); *Bacchus*, 468 U.S. at 276 (commerce clause); *Craig v. Boren*, 429 U.S. 190, 209 (1976) (equal protection clause).

case." *Id.* The two constitutional provisions are correctly reconciled by recognizing that the central purpose of the Twenty-first Amendment was "controlling liquor consumption *regardless of the state or nation from which the liquor might come*." Tribe, *supra*, at 1170 (emphasis added). Favoring local industries was not part of that purpose and thus "was not protected by it." *Id.* The Twenty-first Amendment thus permits the states to decide to be dry, soaking wet, or somewhat damp; it does not permit them to apply different temperance policies depending upon the *source* of an alcoholic beverage.[12] As this Court has explicitly recognized, "[d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower states to favor local liquor industries by erecting barriers to competition." *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 263, 276.[13]

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[12] Petitioners seek support for their position in the legislative history of the Amendment. The Court, however, has noted that despite the legislative history's "obscurity," it provides support for the view that the amendment permits the states to be wet or dry, but not to engage in discrimination. *See Midcal*, 445 U.S. at 106-107 n.10.

[13] The discriminatory features of Michigan's regulatory regime may reflect the efforts of Michigan's wine industry. The industry contributes $75 million to the Michigan economy, $17 million of which comes from tourists who visit the wineries. *See* Michigan Grape & Wine Industry Council, *Michigan Wine Industry Honors Quarter-Century of Growing Wines*,(March 18, 2003), *at* http://www.michiganwines.com/Media/news/03182003.html. It is the 13th largest wine producer in the United States in terms of volume, and fourth in terms of the amount of land dedicated to wine production. *See* Michigan Grape & Wine Industry Council, *Fast Facts, at* http://www.michiganwines.com/Fast_Facts/fastfacts.html (last visited Sept. 21, 2004).

B. The Advent of the Internet Does Not Justify State Discrimination Against Interstate Commerce.

Petitioners invoke the development of the Internet as a post-hoc rationalization for its discrimination, claiming that "[e]lectronic commerce makes it conceivable that large amounts of alcohol could be sold via direct shipment," Wholesalers' Br. at 38, and that holding the State's discriminatory ban unconstitutional presents "new legal obstacles to enforcement." *Id.* *See also* Mich. Br. at 33. That fear has no empirical support. *See generally FTC Study*, at 4. More fundamentally, the success of a national marketplace certainly cannot be used as a justification for state discrimination against it. States could have, moreover, made the same argument about the development of mail-order commerce, or the introduction of marketing by telephone or fax. The Twenty-first Amendment was certainly not intended to bar commerce via modern means of communication and delivery.

Amici do not contest here the state's power to require *all* commerce in alcohol to follow the same rules. Michigan, however, has not taken that course, but has chosen to permit intrastate direct sales to consumers through any technological means, while prohibiting all interstate direct sales. That "selective approach... suggests limits on the substantiality of the interests [Michigan] asserts here." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984). The Sixth Circuit correctly ruled that a state cannot engage in this sort of unjustified and unjustifiable discrimination. Its decision underscores the crucial role of the dormant Commerce Clause in advancing the paramount value of a national market - epitomized by e-commerce - that surmounts protectionist hurdles. It should be affirmed.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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